Supreme Court of the United States

No. 70-295

FIRST NATIONAL CITY BANK,

Petitioner,

against

BANCO NACIONAL DE CUBA,

Respondent.

PETITION FOR REHEARING

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June 29, 1972

TABLE OF AUTHORITIES

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PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court, respondent hereby petitions this Court for a rehearing of the decision herein dated June 7, 1972. Rehearing is sought on the following grounds:

I

There were four issues passed upon by this Court in the several opinions written herein. Although a majority of the Court found in favor of respondent on every one of these issues, the conclusion reached by a majority of the Court was nevertheless to reverse and remand.[1]

The result is a decision which can but sow confusion and doubt in an area of law in which clarification and

[1] The issues were:

1. The validity of the Bernstein exception (Brennan, Stewart, Marshall, Blackmun, Douglas and Powell, JJ. supported respondent's position);

certainty are sorely needed. The decision of the Court affords no guidance for the future. Another case coming before this Court presenting the same set of facts may well be decided differently if the then Legal Advisor to the State Department happens to be an ideological descendant of Abram Chayes,[2] rather than a follower of John Stevenson. Another case coming before this Court presenting the same difficult legal issues, the same problems of possible conflict between the Judicial and Executive Branches, the same effect on our foreign relations, may well be decided differently if the issues are posed by a direct suit rather than by a counterclaim.

In sum, this Court has decided nothing at all, save that in the circumstances of this case, the act of state doctrine does not apply. Why it does not apply remains in doubt, since there was no majority of the Court for any theory supporting its conclusion.

II

This would be an unfortunate result even if the case were an insignificant one, affecting only the parties thereto or relating only to private interests. But the case is far from insignificant. There are other similar cases, even

2. The applicability of the act of state doctrine to a counterclaim (Brennan, Stewart, Marshall, Blackmun and Powell, JJ. supported respondent's position);

3. The inapplicability of the Hickenlooper Amendment, the sole ground of the decision in the District Court. (The entire Court, *sub silentio,* supported the respondent's position);

4. The continued vitality of the *Sabbatino* doctrine. (At least Brennan, Stewart, Marshall, Blackmun and Douglas, JJ. supported the respondent's position.)

This is not the only anomaly in this case. Four justices voted to affirm; four voted to remand to the Court of Appeals, and one voted to remand to the District Court.

[2] The Legal Advisor to the State Department at the time of the *Sabbatino* case.

now pending in the District Courts and, if we read the future accurately, there are many more such cases in the wings awaiting their turn.[3]

All of these cases involve, directly or indirectly, the governments of other nations. They all raise the kind of questions discussed in *Sabbatino* at pp. 428-434; they all involve delicate and difficult questions of law and they all involve substantial sums of money. Most important of all, they all involve the nationalization of private property by underdeveloped nations seeking to recover their natural resources. Such issues are not merely of private concern, they are issues of great public concern affecting not only our nation but others as well.

The influence of this Court on litigation which may develop anywhere in the world will be great, and it is important that its decisions be treated with respect. Such respect will not be forthcoming if the impression is created

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[3] There are no issues in the field of international law which are attracting more attention at the present time than those issues which arise from the nationalization of American-owned property in other countries. Almost every meeting of international lawyers in the last two years has devoted much attention to this subject. The journals devoted to the subject of international law have likewise given the subject a great deal of attention. See, for example, the January, 1972 issue of the American Journal of International Law which has two articles on this very case.

There is good reason for this. It has been estimated that United States properties expropriated since the beginning of 1961 are valued at approximately 2.5 billion dollars. *The Nation*, June 19, 1972, p. 777. This has included, in a short period of two and a half years, property in Peru, Bolivia and Chile. There is no reason to believe that the wave of expropriations has stopped—the contrary is true. Since this Court's opinion was written, Iraq has nationalized its oil installations and present signs point to the likelihood of extensive litigation a rising therefrom somewhere in the world. For a more complete discussion of foreign expropriations of property see the appendix in the respondent's last brief to this Court in this case at pp. 47-57.

that any theory at all will do, so long as a result is reached. It may be that this Court cannot decide these issues by unanimous vote but it should at least strive to do so by majority vote. We urge that a rehearing may help the Court to accomplish such a result.

III

We most respectfully suggest that the opinion of Mr. Justice Douglas, in particular, is based on a fundamental misconception of the meaning of the act of state doctrine and a misunderstanding of the consequences of the action of the Court. While accepting the *Sabbatino* doctrine as good law and rejecting the *Bernstein* exception thereto, that opinion relies exclusively on the fact that, in this case, the act of state doctrine is relied on as a defense to a counterclaim, and concludes that the central issue is governed by the *Republic of China* case, 348 U.S. 356, rather than by *Sabbatino*. We urge that the opinion is in error in several respects:

1. The opinion seems to consider that this is a case in which liability is conceded and the only issue is damages.[4] But this is error; the converse is true. Damages are conceded[5] and, if the act of state doctrine is not applicable, the issue to be litigated is liability. On this record, this Court cannot "allow the setoff" when its validity has not

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[4] So the opinion would remand "for trial on the amount of the setoff and . . . would *allow the setoff* up to the amount of the respondent's claim." (Douglas opinion, page 1, emphasis supplied).

[5] The error is easily understood since the Appendix prepared for this Court is incomplete. The principal opinion of the District Court was dated July 30, 1965 and is reported at 243 F. Supp. 957. That opinion does in fact direct a trial of the amount of the setoff. Subsequently, however, the parties stipulated that, for purposes of this litigation, "if the defendant [petitioner] is lawfully entitled to the offset claimed by it, the amount thereof is such that plaintiff [re-

been litigated in this Court or in the Court of Appeals.[6] On the other hand the *amount* of the setoff has been stipulated so that there is nothing to try on that issue.

2. We suggest, again with respect, that the application of the *Republic of China* case to this action has, at most, only surface plausibility which will not withstand analysis. Mr. Justice Powell is quite correct when he notes (p. 1) that the *Republic of China* case dealt with jurisdiction and the *Sabbatino* case with justiciability. And Mr. Justice Brennan is also correct when he notes (p. 3) that the Douglas view means that the act of state doctrine depends on the dollar value of the counterclaim. But there are still other reasons why *Sabbatino* applies and *Republic of China* does not.

One of respondent's "alternative bases of attack on the judgment of the District Court" to be considered by the Court of Appeals under the opinion of Mr. Justice Rehnquist (p. 11) is that nationalization of petitioner's property in Cuba did not violate international law. This is the very issue which this Court did not reach in *Sabbatino*. It is therefore the issue which this Court will have to decide unless the Court's decision is changed on rehearing.

We need not conjure up hypothetical situations to illustrate the serious problems which will result, for they are

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spondent] will take nothing in this action." Accordingly, on April 25, 1968 a final order was entered dismissing the action on the merits. That stipulation and order were not printed in the Appendix prepared for this Court although they do appear at pp. 131a and 132a of the Joint Appendix printed for the Court of Appeals. The actual state of the record is accurately described at page 3 of the petitioner's brief in this Court, at pages 4-5 of the respondent's brief and at p. 2 of Mr. Justice Rehnquist's opinion.

[6] Nor, for that matter, even in the District Court, which found for the petitioner but only because the court relied on the Hickenlooper Amendment, now evidently abandoned.

hard upon us. On a remand to the Court of Appeals, respondent will argue, as it has argued from the beginning, that the Cuban nationalizations were not a violation of international law. We believe this view of matters to be legally sound and we believe that any court will agree—once it is freed from the pressures which are implicit in this entire situation. See Point VII of respondent's last brief in this Court, pp. 38-46.

However, the pressures upon any court will be overwhelming and may well be irresistible—and we mean no disrespect to the courage and integrity of the judiciary. For the State Department has consistently taken the position, for reasons of its own foreign policy, that the Cuban nationalizations were a violation of international law. 43 Department of State Bulletin 171, 316 (1960). It has built its whole policy with respect to relations with Cuba and the rest of Latin America on that fundamental premise.[7] If the Court of Appeals on remand should be convinced, as we think it will be, that respondent is right on the law, it will be faced with the dilemma of having to repudiate the Executive Branch in an important matter relating to a foreign policy which has governed our relations with Latin America for twelve years, or having to decide the case opportunistically, contrary to the law. The State Department may view this prospect with equanimity but the Court should not.

We do not believe that such a situation should be permitted to occur, and yet it is implicit in this case. A decision by the Court of Appeals in support of petitioner will, in this setting, always be suspect in the eyes of the world. Such a result is intolerable in any case and particularly so in a matter of great moment.

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[7] This policy has included a breach of diplomatic relations with Cuba, a boycott of Cuban goods, a freezing of Cuban funds, the expulsion of Cuba from the Organization of American States, and an effort to induce the rest of Latin America to join in such a boycott—to say nothing of our support of the Bay of Pigs fiasco.

The act of state doctrine is intended primarily to protect this Court and, willy nilly, the Executive Branch of the government even when it is too shortsighted to understand the desirability of that protection.[8] The doctrine only secondarily protects the persons who happen to be litigating. The reasons for the act of state doctrine discussed by this Court in *Sabbatino* all point in that direction. None of them relate primarily to the interests of the parties; all of them are intended to prevent the embarrassment to the Court and to the Executive Branch which would result if these two Branches of our Government were forced into a conflict in the area of foreign relations where such a conflict would be harmful to the best interests of the United States. It is pointless to set forth in this petition any extensive excerpt from the *Sabbatino* decision, but we urge the careful re-reading of that opinion and particularly pages 427-437 thereof.

It may happen—in fact it happens more often than not—that the government whose act of state is at issue is not a party to the litigation at all and is not even represented, as it happens to be in this case, by one of its instrumentalities. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297; *Ricaud* v. *American Metal Co.*, 246 U.S. 304; *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347; *United States* v. *Pink*, 315

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[8] In other administrations, the Executive Branch of the government has been much more cautious. It vigorously supported the act of state doctrine for all of the reasons set forth above in an amicus brief submitted in the *Sabbatino* case; subsequently, when the Hickenlooper amendment was pending before the Congress, administration representatives appeared and testified at length against it on the ground that it would result in a dilution of the act of state doctrine which was seen as a necessary protection for both the Judiciary and the Executive. Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. [1965], p. 1234ff; Hearings before the Senate Committee on Foreign Relations on the Foreign Assistance Program, 89th Cong., 1st Sess. [1965], pp. 728-29.

U.S. 203; *United States* v. *Belmont,* 301 U.S. 324. Still, the Court has applied the act of state doctrine without consideration of what was "fair" to the litigants, because to do otherwise would be to present this Court with the alternatives of being an apologist for the State Department or deciding the case in a manner which would embarrass the Executive Branch.

None of the foregoing considerations are relevant to a sovereign immunity case such as *Republic of China.* There is no suggestion in the *Republic of China* case that any act of state by China was an issue in that litigation. It does not appear from the record that there was any possibility at all of embarrassment to either the Judicial or Executive Branches of the government or any possibility of conflict between them. The only interests sought to be protected by the *Republic of China* doctrine were the interests of the parties to that litigation. Nor is there any suggestion that a question of international law was raised. In short, not a single one of the considerations which moved the Court in *Sabbatino* were applicable to the *Republic of China* case and not a single one of the considerations which moved the Court in the *Republic of China* case are properly applicable to this case.

This was apparently recognized by the parties to the litigation in the *Republic of China* case. The Republic of China did not at any time plead an act of state as a defense to the claim; none of the parties even mentioned act of state in the briefs submitted to this or any lower federal court; none of the act of state cases cited by any of the parties to the litigation and, of course, none of the courts which considered the matter saw any relation at all between the issues in that case and the act of state doctrine.

3. One final point should be added in reference to the view of Mr. Justice Douglas that "fairness" requires the result he reaches.

In the first place, we remind the Court, once again, that the issue here is not whether petitioner or respondent gets the money for which petitioner sues in its counterclaim. Under 31 C.F.R. Part 515.101 to 515.808, any recovery here will be held in a frozen account for ultimate disposition. As the Court of Appeals pointed out, 431 F. 2d 394, at 404, and as Mr. Justice Brennan points out again at page 19 of his opinion, this will result in a preference for the petitioner over other claimants, and there is nothing fair about such a result.

In the second place, considerations of "fairness" are dangerous ones in this field. The present government of Cuba has a long list of grievances against the United States, and particularly against the large banks in the United States, including petitioner, which, in its opinion, exploited the people of Cuba for decades prior to 1969. Obviously, we are not going to argue that point in this memorandum, but in an historical sense there is much to be said in support of this view. If so, no recovery of funds could ever redress the balance. To say that, in these circumstances, it is "unfair" to apply the act of state doctrine as a defense to a counterclaim is to draw the boundaries of the Court's concern with "fairness" at an arbitrary point.

And, finally, the issues of national policy with which we are here concerned are of such a nature that "fairness" ought not to be a consideration in any event. This Court evidently was not concerned with fairness when it denied certiorari in *Sardino* v. *Federal Reserve Bank,* 361 F. 2d 106 (2nd Cir. 1966), *cert. den.* 385 U.S. 898, although the effect of that decision was to deprive an elderly impoverished Cuban longshoreman of the proceeds of a life insurance policy of which he was the beneficiary. The justification for that denial was that the best interests of the United States required freezing of Cuban funds. We suggest that the best interests of the United States here also require the application of the act of state doctrine.

IV

The opinion of Mr. Justice Powell, we suggest, fails to give sufficient weight to the problems above discussed. We disagree with the view expressed in that opinion, suggesting that the *Sabbatino* holding was too broad, but even on a very narrow application of the act of state doctrine based on "a careful examination of the facts in [this] case and of the position, if any, taken by the political branches of the government" (Powell opinion, p. 2), the act of state doctrine should be applied here. We will not repeat the considerations which are discussed fully above at pp. 5-8. Even if "the judiciary [is not compelled] to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law", it is compelled to eschew acting in this case.

We do not assume that there is no such thing as international law that can be resolved only by the exercise of power. The field of international law is a very broad one, and includes a wide variety of subjects. The only aspect of international law covered by the *Sabbatino* case was that set forth in footnote 1 of Justice Powell's opinion and certainly that does not exhaust the field of international law.

Even on the narrowest possible interpretation of the act of state doctrine, we suggest that it is applicable here.

CONCLUSION

The respondent respectfully petitions this Court for a rehearing and upon such rehearing for an order affirming the decision of the Court of Appeals.

Respectfully submitted,

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June 29, 1972

CERTIFICATE

I hereby certify that the within petition for rehearing is presented in good faith and not for delay. The petition is restricted to the grounds above stated.

VICTOR RABINOWITZ